In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1767

RISS INTERNATIONAL CORPORATION,
Petitioner,

vs.

GEORGE P. BAKER, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RODGER J. WALSH
903 Grand Avenue
Kansas City, Missouri 64106
(816) 471-4690
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Riss International Corporation prays that a Writ of Certiorari be issued out of this Court to review the judgment of the Supreme Court of Illinois entered on March 30, 1978 denying a petition for leave to appeal thereby affirming the judgment of the Appellate Court of Illinois entered on October 26, 1977.

CITATION TO OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, is reported as George P. Baker, et al., Plaintiff-Appellee vs. Riss International Corporation, Defendant-Appellant, at 373 N.E.2d 120 (Table) and the opinion is printed in the Appendix hereto together with the order of the Supreme Court of Illinos denying the petition for leave to appeal.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), 28 U.S.C. 2101(c), and 28 U.S.C. 1738.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Supreme Court denied to the petitioner the full faith and credit of its Missouri judgment against the respondent on the grounds that the Missouri judgment was res judicata as to the claim of the respondent against the petitioner in Illinois.

a) The petitioner had obtained in Missouri a judgment against the respondent on August 22, 1974 before the respondent obtained a judgment against the petitioner herein in Illinois and that therefore the Missouri judgment would be res judicata and under Article IV Section 1 of the Constitution and 28 U.S.C. 1738 would bar the Illinois action on the grounds of res judicata.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE IV

States and Territories

Section 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

28 U.S.C. 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Respondents, trustees of the Penn Central Transportation Company ("Penn Central"), a railroad undergoing reorganization pursuant to Section 77 of the Bankruptcy Act (11 U.S.C. 205) brought this action against defendant Riss International Corporation ("Riss"), a motor common carrier. Penn Central claimed payment of $41,183.02 as freight charges to be due from Riss for 201 shipments of Riss' freight during 1970.

Riss filed an answer raising as an affirmative defense that the claims which were the subject of the Illinois suit arose prior to the time when Penn Central brought suit against Riss in Missouri and were barred, on the principle

of res judicata, by the Missouri judgment for $33,643.15, entered in the Missouri Court on August 27, 1974. Riss also counter-claimed seeking to set off the amount of the Missouri judgment.

The trial court initially denied Riss' motion to dismiss on the grounds of res judicata and thereafter Riss pled in its answer the res judicata defense. At the conclusion of the trial, the Court entered a judgment against Riss for $25,000.00. Riss appealed to the Appellate Court of Illinois on the grounds that the Missouri judgment was res judicata as to the Penn Central claim and Penn Central cross-appealed contending the damages were against the weight of the evidence. The Appellate Court vacated the judgment and remanded it with directions for entry of judgment for Penn Central in the amount of $41,183.02 on October 26, 1977. Riss' petition for rehearing was denied on November 30, 1977 and Riss' petition for leave to appeal to the Supreme Court of Illinois was denied on March 30, 1978.

The facts of the instant matter are undisputed that all of the monies claimed herein accrued under the involved contract during the period between April, 1970 and July, 1970. Thus, the claimed obligations preceded the institution by Penn Central of the lawsuit filed in June, 1971 in a Missouri Circuit Court. As previously noted, the Missouri suit involved monies due Penn Central arising under the contract involved in this proceeding. The amounts claimed herein were contemporary with those involved in the Missouri action. (Tr. 43-44)

Thus, the fact that: the subject matter of this claim was in existence prior to the institution of the Missouri suit; that the parties are the same; that the basis of the suit (the contract) is the same; and, that no compelling reason,

i.e., transportation exclusively involving Illinois, exists for dividing this single suit between Missouri and Illinois, one can reasonably conclude that Penn Central was "forum shopping." Certainly, Penn Central's stipulation that it knew of the pendency of both the Missouri and Illinois proceedings before either went to judgment reflects that their bifurcation of this breach of contract action was voluntary. (Tr. 59)

Penn Central stipulated that at the time the instant cause was brought, there was an action pending in Missouri. (Tr. 59) Testimony of Penn Central's Witness Bubba showed that the 201 bills here involved were the same type of bills involved in the Missouri action and arose out of the same Divisional Agreement and were in existence when the Missouri action was commenced.

Furthermore, a review of the Divisional Agreement (C45-64 of Designation of Excerpts) reflects that it is one indivisible contract which controls the conduct of the parties. For example, Item 10 sets forth the application of the agreement and pertinent conditions. (C48) Item 30 sets forth the trailer specifications. (C48) Items 60, 70 and 80 deal with indemnification and liability of the parties. (C49) Items 90, 100 and 110 set conditions for carriage of certain commodities. (C50) Item 140 involves movement of empty trailers (C51) Item 150, which involves payment of charges, reflects the continuous nature of the agreement, the billing procedure and the fact that credit is extended. (C51)

The opinion of the Appellate Court and the record sets out the fact that Riss raised the question of res judicata of the Missouri judgment at every stage of the proceeding, but the Court failed to give it full faith and credit.

REASON FOR ALLOWANCE OF THE WRIT

The writ should be granted because the Illinois Court has failed to give full faith and credit to the Missouri judgment contrary to Article IV Section 1 of the Constitution and 28 U.S.C. 1738. The decision is contrary to this Court's holding in *Morris* v. *Jones,* 329 U.S. 545.

Penn Central brought the first suit on its claim under its Divisional Agreement in Missouri, then later after the Missouri suit was filed, brought a second suit on the same Divisional Agreement in Illinois. The Missouri judgment of August 27, 1974 should have barred the Illinois action as res judicata.

Under Missouri law the action in Illinois, if brought in Missouri, would have been barred by the Missouri judgment. *Civic Plaza National Bank of Kansas City* v. *University Nursing Home, Inc.,* 504 S.W.2d 193, where at page 200 the Court stated:

> "As a further definition (not a restriction but an extension of the rule) the Missouri courts have held judgments to be res judicata and binding upon the parties, and their privies must have concluded not only those matters which were litigated and determined, but also those matters which could have been litigated and determined. *State ex rel. Farmer* v. *Allison,* 359 S.W.2d 245, 246-247 (Mo. App. 1962); *Sierk* v. *Reynolds,* 484 S.W.2d 675, 681 (Mo. App. 1972); *Smith* v. *Preis,* supra; *Abeles* v. *Wurdack,* supra."

Since Penn Central under the Missouri law could and should have brought the Illinois claim in Missouri then the Missouri judgment is an absolute bar to the Illinois action and the Illinois Court erred in failing to give it full faith and credit.

It is undisputed that the involved claims arose prior to the institution of the Missouri action and could have been brought in that proceeding. (R. C25-26 and Tr. 34, 43-44 and 59)[1]

It is undisputed that the claims in both the prior Missouri action and the instant suit arose out of the Divisional Agreement, the only contract here involved. For example, Witness Bubba, in identifying Penn Central's Exhibits 3 and 3A, testified that Exhibit 3 was:

> "A division basis for the railroad as to Plan 1 shipments. It determines the amount of money that the railroad should collect from the trucking companies as to move their particular merchandise and trailers from a certain terminal to another terminal on the railroad, which is considered an intermediate point as far as the railroad is concerned." (Tr. 9-10.)

The witness further identified Penn Central's Exhibit 3 as an intermodal type of agreement between the railroad and the truckers and identified defendant as a trucker participant to that agreement. (Tr. 10-11) The witness also knew the agreement between the railroad and the trucker was in writing. (Tr. 16)

Penn Central's Exhibit 3A was identified as a supplement to the original agreement which changed only the charges. Further, the witness stated that the original agreement remained in full force and effect without exception to the supplement. (Tr. 11) Finally, the witness concurred with Penn Central's attorney's statement:

> "In summary, if you want to find what the charges are by the motor carriers, you have to consult this

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1. Tr. references refer to Transcript pages contained in the Report of Proceedings which are contained in the Designation of Excerpts, indexed by transcript page reference.

[Exhibit 3] initially in order to make out the proper bills, is that correct?" (Tr. 12.)

It is clear from the foregoing that the individual waybills are not separate contracts as they do not contain the elements necessary to independent contractual obligations. They are merely evidence of action or conduct performed pursuant to the divisional agreement which is the contract between the parties and which controls the conduct of the parties and their respective rights, duties and obligations.

In an unrelated case, *Baker* v. *Riss International,* 444 F.2d 257 (8th Cir. 1971), Penn Central herein sued defendant herein for storage and detention charges. The court held, *inter alia,* that "plaintiff's cause of action rests solely on the divisional agreement." 444 F.2d 257, 259. This is significant as it shows that the Eighth Circuit found the divisional agreement controlled the rights, duties and obligations of the parties. This finding is consistent with the testimony of Penn Central's witness and should be the finding in this proceeding.

Where, as here, there is identity of subject matter, claims arising out of the same contract and identity of parties, a claimant cannot choose to litigate piecemeal. To conclude as the Appellate Court must have that there were 201 individual claims arising out of the contract would destroy the principle that litigation should have an end and multiplicity of suits should not be sanctioned. *Bulk Terminals* v. *E. P. A.*, 29 Ill. App. 3d 978, 331 N.E.2d 260 (1975). In *Consol Builders & Supply Co.* v. *Ebens,* 24 Ill. App. 3d 988, 322 N.E.2d 248 (1975) this principle and the underlying judicial policy was succinctly stated:

> "If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim,

> notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. The principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice,—namely, that litigation should have an end and that no reason [person] should be unnecessarily harassed with a multiplicity of suits." Citing *Dorland* v. *Steinbrecher,* 50 Ill. App. 2d 344, 347, and *Hulke* v. *International Manufacturing Co.,* 14 Ill. App. 2d 5, 22.

Consol, supra, was a mechanic's lien foreclosure action. Defendant raised the bar of *res judicata* on the basis that plaintiff had previously sued and obtained a judgment against defendants for extras arising out of the construction of a building. The mechanic's lien foreclosure was for money due under the original contract. Plaintiff contended that the causes of action were independent, separate and distinct. The court in sustaining defendant's position said:

> "The claim for sums due for extras and the claim for sums due under the contract are at best separate elements of one cause of action. *All claims have their origin in the contract for the construction of the residence.* That contract contained express recognition that changes might arise during construction and provided for the mode of payment. All claims spring from a common source, a common time, and from one transaction. Plaintiff elected its remedy and brought its suit. After having been successful in obtaining a judgment and getting it satisfied, it cannot then begin another action for another sum allegedly due on the same transaction. There must be an end to litigation,

> and the policy alluded to above proclaims it. Plaintiff could have included the sums allegedly due under the contract in this action for a money judgment or could have included the amounts due for extras in the lien and foreclosure." (Emphasis added.) 24 Ill. App. 3d 988, 991, 992.

See also *Phelps* v. *City of Chicago*, 331 Ill. 80, 162 N.E. 119 (1928); *Prochosky* v. *Union Central Life*, 2 Ill. App. 3d 354, 276 N.E.2d 388 (1971); and *Liberty Mutual Insurance Co.* v. *Duray*, 5 Ill. App. 3d 187, 283 N.E.2d 58 (1972).

In total disregard of the above decisions, the Appellate Court ruled that the prior suit and judgment was not a bar to the instant cause. It reached this decision in reliance on *Turzynski* v. *Liebert*, 39 Ill. App. 3d 87, 350 N.E.2d 76 (1976). Its reliance on *Turzynski* exemplifies its misunderstanding of the instant case. In *Turzynski*, although there was one contract of sale, the first suit only involved an attempt to obtain injunctive relief from the violation of a restrictive covenant. This was a separate and distinct right specifically enforcible by its terms. That contract clearly gave rise to more than one cause of action. In the instant case, there is one contract involving the right to collect charges for services rendered thereunder. The fact that the services to be rendered may have involved separate acts does not mean that each act would constitute a separate cause of action. The logical extension of this Court's order is that each of the 201 shipments was an independent cause of action. This would result in a multiplicity of suits contrary to a fundamental purpose of the doctrine of *res judicata*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the Illinois judgment should be reversed for failure to give full faith and credit to the Missouri judgment.

Respectfully submitted,

RODGER J. WALSH
903 Grand Avenue
Kansas City, Missouri 64106
(816) 471-4690
Attorney for Petitioner Riss International Corporation

June, 1978

APPENDIX

IN THE APPELLATE COURT OF ILLINOIS
First Judicial District

GEORGE P. BAKER, et al.,
Plaintiffs-Appellees,

vs.

RISS INTERNATIONAL CORPORATION,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable James D. Crosson, Judge Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Plaintiffs, trustees of the Penn Central Transportation Company, a railroad undergoing reorganization pursuant to section 77 of the Bankruptcy Act (11 U. S. C. § 205), brought this action against defendant, Riss International Corporation, a common carrier. Plaintiffs sought payment of $41,183.02 as freight charges claimed to be due the railroad for 201 shipments of defendant's goods during 1970. Defendant filed an answer raising as an affirmative defense that the claims which were the subject of the Illinois suit arose prior to the time when plaintiffs brought suit against defendant in Missouri and were barred, on the principle of *res judicata,* by the judgment, for $33,643.15, entered in the Missouri court on August 22, 1974. Defendant also counterclaimed seeking to set off the amount of the Missouri judgment. Following a bench trial, judgment was entered for plaintiffs in the amount of $25,000. Defendant has appealed contending plaintiffs' cause of action was barred by the doctrine of *res judicata.* Plain-

tiffs have filed a cross-appeal contending that the award of damages was against the manifest weight of evidence and ask that judgment be entered for the amount originally sought.

Plaintiffs introduced photostatic copies of local freight waybills by stipulation. Richard Bubba, a collection agent for the Penn Central, testified that he had examined these waybills and that they were computed correctly in accordance with Penn Central's Plan 1 "Trucktrain," a document governing the freight charges between Penn Central and numerous motor carriers, including defendant.

Plaintiffs also presented the testimony of Thomas Preising, who at the time of trial was manager of terminal services for plaintiffs and was familiar with the procedures used by the individual terminals in the handling of freight by piggy back. Of the 201 shipments involved in this litigation, it was stipulated that plaintiffs could not locate delivery receipts for 52 shipments, totaling $18,582. During cross-examination, Preising testified that the absence of the delivery receipts in these transactions did not suggest that the shipments in fact had not been delivered, and he had often seen documents "disappear" during his years with the railroad. Moreover, if the trailers did not arrive, defendant would have made a claim for damage to the trailers and the company would have a record of this.

Mere assertion of the defense of *res judicata* is not sufficient. The party invoking the doctrine must plead and prove that the same cause of action or the same issues were involved in both proceedings; a contract may give rise to more than one cause of action and the test for determining whether the causes of action are the same is whether the same evidence would sustain both actions. (*Turzynski* v. *Liebert* (1976), 39 Ill. App. 3d 87, 90, 350 N. E. 2d 76.) In the case at bar, defendant introduced

a copy of the Missouri judgment, but did not present any of the evidence or exhibits admitted in the Missouri trial. That judgment does not establish that any of the 201 shipments that were the subject matter of this trial were involved in any manner in the Missouri litigation. Defendant, therefore, did not establish by clear, certain and convincing evidence that the issues in the Missouri action were determinative of the issues in this case. We conclude the trial court properly rejected the defense of *res judicata* under the circumstances presented.

In regard to the cross-appeal, defendant concedes the record supports a judgment of $22,194.02, but contends that no judgment should have been entered for the additional $18,582, since it was stipulated that there were no delivery receipts for waybills totaling this amount. In essence, defendant contends plaintiffs did not prove delivery of these shipments. However, each of the waybills admitted into evidence by stipulation contains detailed information concerning each shipment and each is signed by a representative of defendant. In view of this evidence, the delivery receipt would have been cumulative evidence only. Defendant presented no contrary evidence. Under the circumstances, the judgment of the circuit court is against the manifest weight of the evidence and judgment for the full amount claimed by defendant should have been entered. Accordingly, we vacate the judgment in the amount of $25,000 and remand the cause to the circuit court with directions that judgment be entered for plaintiffs and against defendant in the amount of $41,183.02. Ill. Rev. Stat. 1975, ch. 110A, par. 366(a)(5).

It is our judgment that no issue of substance is presented and that an opinion in this case would have no precedential value. For these reasons, this appeal is disposed of on the authority of Supreme Court Rule 23 (Ill. Rev. Stat.

1975, ch. 110A, par. 23). The judgment of the circuit court of Cook County is vacated and the cause is remanded with directions for entry of judgment for plaintiffs in the amount of $41,183.02.

Dated at Chicago, Illinois, this 26th day of October, 1977.

Enter:

/s/ MAYER GOLDING,
Presiding Justice

IN THE APPELLATE COURT, STATE OF ILLINOIS
First District

Case No. 77-510

GEORGE P. BAKER, et al.,
Plaintiff-Appellee,

vs.

RISS INTERNATIONAL CORPORATION,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
The Hon. James D. Crosson, Judge Presiding.

ORDER

Upon due consideration of the petition for rehearing filed herein by defendant-appellant on November 16, 1977, it is

Ordered: that said petition is hereby Denied.

Dated at Chicago, Illinois, this 30th day of November 1977.

Enter:

/s/ MAYER GOLDING
Presiding Justice

/s/ THOMAS A. MCALDAR
Justice

/s/ JOHN M. O'CONNOR JR.
Justice

State of Illinois

office of

CLERK OF THE SUPREME COURT

Springfield

62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

March 30, 1978

Mr. Rodger J. Walsh
Attorney at Law
1200 Temple Building
903 Grand Avenue
Kansas City, MO 64106

No. 50296—George P. Baker, et al., etc., respondents, vs. Riss International Corporation, petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

No. 77-1767

In the
Supreme Court of the United States
OCTOBER TERM, 1977

RISS INTERNATIONAL CORPORATION,
Petitioner,

vs.

GEORGE P. BAKER, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JAMES P. REEDY
Suite 1401—One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7660
Attorney for Respondents

The Scheffer Press, Inc.—(312) 263-6850

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RISS INTERNATIONAL CORPORATION,

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

George P. Baker, et al., prays that a Writ of Certiorari be denied Petitioner by this Court to review the judgment of the Supreme Court of Illinois entered on March 30, 1978 denying a petition for leave to appeal thereby affirming the judgment of the Appellate Court of Illinois entered on October 26, 1977.

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court properly denied to give full faith and credit to petitioner for its Missouri judgment which was based on a different cause of action, related to different subject matter and no nexus involving a common time, source or transaction?

STATEMENT OF THE CASE

The Plan I Tructrain Agreement sets out the charges to be paid by a participating truck line to the Penn Central for hauling the trucker's trailer, loaded or empty, on a railroad flatcar between piggyback terminals located on the Penn Central (Rec. 9-12; 16-18). The trailer-on-flatcar move is usually intermediate to over-the-road motor carrier moves at origin and destination points. Each shipment handled by Penn Central under the Tructrain Agreement is a separate and independent transaction, represented by its own documentation (C202-400). Each document (freight waybill) contains, among other data, the specific charge applicable to the shipment, as indicated by the origin and destination points on the waybill. This figure is obtained from the pricing schedule in the Tructrain Agreement (Rec. 16-17). The 199 bills with freight charges entered thereon were stipulated into evidence by the parties (Rec. 62). Witness Bubba testified that he had checked these bills against the Tructrain pricing schedule and that the billing was correct (Rec. 17-18). The total tariff charges due on these 199 bills is $41,183.02.

Defendant Riss did not introduce any witnesses. The only defense offered was a judgment rendered in favor of Riss in the Circuit Court of Missouri, 16th Judicial Circuit, Case No. 74 9169 (C27-30). This was a judgment entered in connection with a counterclaim for freight damage to shipments not involved in the instant suit. A judgment on the counterclaim was entered on 8-27-74 for $33,643.15. The Petitioner sought to have the Missouri judgment set off against the judgment entered in this suit, but the Court refused to do this. Petitioner thereupon raises the

claim on appeal that Penn Central should have included all the bills in this suit in the suit initiated by Penn Central in Missouri, because the bills in this suit had accrued in 1970 and the Missouri suit was filed on 6-29-71. They further claim that failure to do so renders those not included in the Missouri suit *res judicata.*

Respondent contends that Petitioner has not proved by the introduction of this judgment order that the Missouri action of Penn Central involves identical subject matter and an identical cause of action, since the judgment order only refers to Riss' counterclaim in that proceeding. There is no evidence concerning the subject matter, the issues or the claims of Penn Central in the Missouri suit in the record in this proceeding.

REASON FOR NOT ALLOWING THE WRIT

The writ should not be allowed because the Illinois Court properly denied to give full faith and credit to the Missouri Judgment. The two judgments were based on different causes of action involving different subject matter. Neither originating from a common time, source or single transaction. Therefore, the decision was proper under Article IV, Section 1 of the Constitution and 28 USC 1738. The decision was not contrary to this Court's holding in *Morris* v. *Jones,* 329 U.S. 545, 1947.

Morris v. *Jones (Id.)* can be factually distinguished. An unincorporated association was authorized by Illinois to transact an insurance business there and in other States. It qualified to do business in Missouri. Petitioner sued the association in a Missouri Court for malicious prosecution and false arrest. Subsequently, but before judgment was obtained in Missouri, an Illinois Court appointed a liquidator for the association and issued an order staying suits

against it. All assets vested in the liquidator. With notice of the stay order, petitioner continued to prosecute the Missouri suit, but counsel for the association withdrew and did not defend it. Petitioner obtained a judgment against the association in Missouri and filed copy as proof of his claim in the Illinois proceedings. An order disallowing the claim was sustained by the Supreme Court of Illinois and an appeal was taken to this Court.

The Court stated at page 554 of the opinion:

> "The single point of our decision is that the nature and amount of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter."

The Court was not involved with the type of factual situation presented in the case at bar. It is clear the Court was involved with the conclusiveness of the nature and amount of the claim. In the case at bar, the nature and amount of the claim was never determined by the Missouri judgment. The evidence to support these bills was never introduced in the Missouri action. They were not the subject matter of any previous claim. Further, the subject matter of the Illinois suit was not *res judicata* when filed on 3-23-73 (C12) because no judgment had been rendered in the Missouri case until 8-27-74. The Petitioner could have easily filed a motion in either court to transfer or consolidate the claims in both actions on the ground of *forum non conveniens*. Petitioner did not choose to do so and respondent should not be penalized for petitioner's oversight.

As mentioned in the Statement of the Case, there is no evidence concerning the subject matter, the issues, or the claims of Penn Central in the Missouri suit in the record

in this proceeding. A mere plea of *res judicata* without any proof of the issues, the evidence presented, or the pleadings filed in the prior action is insufficient to establish a defense. *Barnes* v. *Barnes,* 1948, 76 N.E.2d 64; 333 Ill. App. 664: *Meeker* v. *Webner,* 366 N.E.2d 539, 1977, 51 Ill. App. 3d 716.

Petitioner asserts that the action, if brought in Missouri, would have been barred by the Missouri judgment. In so stating, he quotes from *Civic Plaza National Bank of Kansas City* v. *University Nursing Home Inc.,* 504 S.W. 2d 193 at page 200, citing several authorities, *State ex rel. Farmer* v. *Allison,* 359 S.W. 2d 245, 246-247 (Mo. App. 1962); *Sierk* v. *Reynolds,* 484 S.W. 2d 675, 681 (Mo. App. 1972); *Smith* v. *Preis, Supra,: Abeles* v. *Wurdack, Supra.* None of these cases is representative of the situation that we have in the case at bar. In all of these cases there was but one cause of action. In *Civic,* the original suit was filed by a Bank to recover balance due on a note assigned to it as collateral security for loans and to have stock pledged to secure such note delivered to it. The question of *res judicata* hinged upon parties and their privies, not a contract action of like nature as we have in our case. The Court in *Sierk* was concerned with the interest of the assignee of a special tax bill for construction of sewers in an action brought by him. Again, the question of *res judicata* hinged on parties and their privies. In *Farmer,* the Court was concerned with whether or not it was proper to refuse to set aside the appointment of an administrator in probate court. Here also, the question of *res judicata* encompassed parties and their privies.

Our situation in the case at bar is quite unique. The Tructrain Agreement is a master agreement governing thousands of individual shipments. It is therefore, a sever-

able contract. The Illinois courts are clear on their definition of a severable contract: "one that is composed of independent parts, the performance of any one of which will bind the other party pro-tanto". *Chemetron Corporation* v. *McLouth Steel Corporation,* 381 F. Supp. 245 affirmed 522 F.2d 469. "If the part to be performed by one party consists of several distinct and separate items, and prices to be paid by the other party is apportioned to each item to be performed, or it is left to be implied by the law, the contract will generally be held to be severable." *Amsler* v. *Bruner,* 173 Ill. App. 337, (1912) certiorari denied; *Ribidoux* v. *Baltz,* 153 Ill. App. 100 (1910). This is precisely what each bill of lading is under the Tructrain Agreement. Each bill of lading is an independent part, several, distinct and separate. The evidence of the performance of any one of which will lend the other party to a price to be paid by the other apportioned to each item to be performed. Where this is the case, Illinois law provides that the joinder of causes of action is permissive—not mandatory. *Ch. 110, para. 44, Ill. Revised Stats., Illinois Civil Practice Act 1978.*

The test of *res judicata* is whether the same evidence would sustain all actions. *Melohn* v. *Ganley,* 344 Ill. App. 316; 100 N.E.2d 780. Since each shipment is an independent transaction, reason tells us different evidence will be needed to sustain the claim for freight damages and/or charges due on each shipment.

Dulaney v. *Payne,* 101 Ill. 325 (1882) makes the point that where more than one *cause of action* arises under the same contract, the claimant is free to commence separate suits for each cause of action if he so chooses. The Court said (page 332):

> "For instance, A may loan B $6,000.00, and as evidence of a debt take three promissory notes of $2,000 each. Now, while the notes all grow out of one transaction *and one contract,* they are several, and a separate action may be brought on each one of them."

This is Respondent's case. Each shipment, while controlled by the Plan I Tructrain Agreement, is an independent transaction, represented by a separate bill of lading, and a separate set of facts. Therefore, each is a separate cause of action which may be brought independently of other shipments moving under the same Agreement. Chapt. 110, para. 44 of Illinois Civil Practice Act, by its terminology, indicates a claimant has this option. It provides:

> "§ 44. Joinder of Causes of Action and Use of Counterclaims. (1) Subject to rules any plaintiff or plaintiffs *may* join any causes of action, whether legal or equitable or both, against any defendant or defendants; and subject to rules the defendant may set up in his answer any and all cross demands whatever, whether in the nature of recoupment, setoff, cross bill in equity or otherwise, which shall be designated counterclaims."

The language used makes the matter of joinder of different causes of action permissible rather than mandatory. *Chas. Todd Uniform Rental Services* v. *Klysce,* 1961, 30 Ill. App. 2d 274; 174 N.E.2d 570.

Respondent clearly sees that the cause of action rests solely on the divisional agreement. However, involved in that agreement covering thousands of individual shipments are several causes of action. It is evident that there is no identity of subject matter common to the two suits. Nor, do all the claims spring from a common time, a common source, and from one transaction.

Petitioner cites *Consol Builders and Supply Company* v. *Ebens,* 24 Ill. App. 3d 988, 322 N.E.2d 248 (1975), as authority for the proposition that *res judicata* extends to all grounds of recovery or defense which might have been presented. This general rule is not applicable here because the joinder of different causes of action is governed by the Illinois Civil Practice Act, Chapt. 110, Section 44 (1978) which makes joinder permissive not mandatory as stated above. Further, in *Consol,* the original complaint in small claims was for "extras due" and "building materials and labor", the subject matter of the second suit, the issue was declared *res judicata.* Again, distinguishing it from the case at bar.

On page 10 of Petitioner's brief, he cites several cases as authority along with *Consol,* Supra. None of these cases deals with the fact situation peculiar to the case at bar. *Phelps* v. *City of Chicago,* 331 Ill. 80, 162 N.E. 119 (1928); *Prochosky* v. *Union Central Life,* 2 Ill. App. 3d 354, 276 N.E.2d 388 (1971); and *Liberty Mutual Insurance Co.* v. *Duray,* 5 Ill. App. 3d 187, 283 N.E.2d 58 (1972). *Prochosky* dealt with a suit in equity to recover commissions allegedly due, a suit in law was *res judicata,* the suit in equity stands as a bar. *Liberty* was concerned with a suit based on an arbitration declared final on an insurance question, plaintiff was barred from seeking restitution of the same question at law.

The Appellate Court did not rule disregarding the cited authorities, as petitioner insists. The Court properly ruled in reliance on *Turzynski* v. *Liebert,* 39 Ill. App. 3d 87, 350 N.E.2d 76 (1926). In *Turzynski,* although there was one contract for sale, the first suit involved an attempt to obtain injunctive relief from the violation of a restrictive covenant. This was found by the Court to be a separate and distinct right specifically enforceable by its terms. The

breach of contract for failure to deliver certain assets was never litigated and therefore not barred as *res judicata.* (Page 79 and 80 of the Opinion.) That contract clearly gave use to more than one cause of action. The Appellate Court understanding the facts of this matter, saw the relationship of each bill of lading as a separate and distinct cause of action specifically enforceable by its terms.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied and the Illinois judgment should be affirmed.

Respectfully submitted,

James P. Reedy
Suite 1401—One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7660
Attorney for Respondents,
George P. Baker, et al.

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